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In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
Petitioner,

v.

FRED P. GARDNER
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR AMICI CURIAE PARALYZED VETERANS OF AMERICA VETERANS OF FOREIGN WARS AMERICAN VETERANS OF WWII, KOREA AND VIETNAM BLINDED VETERANS ASSOCIATION VIETNAM VETERANS OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI AND SUMMARY OF ARGUMENT

The following organizations join in this brief as *amici curiae* in support of the respondent veteran, Fred P. Gardner: The Paralyzed Veterans of America; The Veterans of Foreign Wars; AMVETS (American Veterans of World War II, Korea and Vietnam); The Blinded Veterans Association; and, the Vietnam Veterans of America.[1] Each organization is composed

[1] The American Legion has acknowledged the importance of this case but is prohibited by internal regulations from joining any fellow service organization in litigation. This policy extends to Briefs Amicus Curiae.

of veterans of the Armed Forces of the United States some of whom, but for the position taken by the Department of Veterans Affairs[2], would be eligible for the same benefits claimed by Mr. Gardner. As such, each organization supports Mr. Gardner in obtaining affirmance of the decision of the Court of Appeals.

More particularly the organizations, listed in the order of joining the brief, and their interests are described as follows:

The Paralyzed Veterans of America ("PVA") is composed of over 16,000 veterans who served honorably in the armed forces of the United States or its allies and who have a spinal cord injury or disease. The Paralyzed Veterans of America is chartered by the Congress of the United States as a national association for the benefit of those veterans who have suffered injuries or disease of the spinal cord. See 36 U.S.C. § 1153 (1988). PVA has 46 chapters or subchapters in the United States and the Commonwealth of Puerto Rico.

The Veterans of Foreign Wars ("VFW") is composed of 2.2 million veterans of the armed forces of the United States who served honorably overseas in time of war and in several peacetime campaigns and a 750,000 member Ladies Auxiliary. Founded in 1899, the organization is the oldest of the major veterans service organizations and received a congressional charter in 1936. See 36 U.S.C. § 111 (1988) *et seq*. Among the purposes for which it was chartered are to assist veterans, their widows and orphans. 36 U.S.C. § 113 (1988). The VFW has over 11,000 posts located in all 50 states and a dozen foreign countries and territories. Throughout its 94 years, the VFW has been active in every effort to secure appropriate rights and privileges for America's veterans.

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[2] In 1989, the Veterans Administration was raised to cabinet level and renamed the Department of Veterans Affairs. See the Department of Veterans Affairs Act, Pub. L. 100-527, 552,10; 102 Stat. 2635. In this brief the Department will be referred to by its more commonly known acronym, the "VA".

The American Veterans of World War II, Korea and Vietnam (AMVETS) is a congressionally chartered organization of veterans and their dependents. See 36 U.S.C. § 67 (1988). As a family organization, AMVETS 200,000 members are joined in their endeavors with the members of AMVETS Auxiliary, Sons of AMVETS and Junior AMVETS who together have served the needs of the veteran for 50 years.

The 8,000 member Blinded Veterans Association (the "Association") was founded in 1945 by blinded veterans of World War II to provide for the welfare of blinded veterans and to enable these veterans to provide mutual aid and assistance to one another. The Association is chartered by the Congress of the United States. See 36 U.S.C. § 851 (1988). Services rendered by the Association include counseling to blinded veterans and their families and assistance in obtaining benefits from the Department of Veterans Affairs.

The Vietnam Veterans of America ("VVA") is a congressionally chartered organization with over 40,000 members who are veterans of the war in Vietnam. See 36 U.S.C. § 3801 (1988). These members are located in over 300 chapters and some 40 councils throughout the United States. One of the purposes of the organization is to assist disabled Vietnam-era veterans and other veterans in need of assistance in obtaining veterans benefits.

By their consolidated appearance as *amici*, these organizations wish to underscore the importance of a much broader and central issue in this case, the authority of the courts to oversee the adjudication of claims for veterans benefits, the interpretation by the VA of statutes passed by Congress which grant entitlement to those benefits, and the degree of deference due any such interpretation by the VA.

Further, this case presents the Court with its first opportunity to review the legality of the VA's pre-judicial review interpretation of veterans' benefit laws in light of the Veterans'

Judicial Review Act[3]. If this Court were to decide that *Chevron*-type[4] deference is due VA regulations promulgated before judicial review, the impact of this historic legislation will be severely limited.

The Solicitor General would have this Court reverse the decisions of both the U.S. Court of Veterans Appeals and the U.S. Court of Appeals for the Federal Circuit both which have found invalid 38 C.F.R. § 3.358(c)(3), the VA's regulatory interpretation of 38 U.S.C. § 1151 (Supp. IV 1992). In large measure the Solicitor supports his position by claiming that the decisions of the lower courts are inconsistent with the commonly accepted fault-based principles of law relating to medical malpractice, which, according to him, provided the background for Congress' enactment of Section 1151 and is consistent with the accepted principles of recovery for adverse medical outcomes. (*See e.g.* Pet. Brief at 17, 19, and 20).

The Solicitor's reliance on the common law of medical malpractice is misplaced for at least two reasons. First, the statutory scheme in which Section 1151 must be viewed is not a system to compensate the general class of persons suffering misfortune due to medical treatment — it is a statutory scheme designed to provide liberal benefits to veterans of the armed forces of the United States who have accepted the hardships of military service and have served their country in both war and peace. Second, prior to November 18, 1988, there were almost no judicial decisions regarding the validity of the VA's regulations which interpreted the laws relating to veterans benefits. Indeed, the need for such supervision of the VA's administration of veterans' benefits legislation, by an independent judicial body, was recognized by Congress when it responded to com-

[3] Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1989).

[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

plaints of the VA's abuse of its regulatory authority by repealing the non-review portions of 38 U.S.C. § 211(a) and created the U.S. Court of Veterans Appeals.

ARGUMENT

I. THE LAWS PROVIDING BENEFITS TO VETERANS OF THE ARMED FORCES SHOULD BE INTERPRETED IN A MANNER WHICH MOST BENEFITS THE VETERAN

A. Section 1151 Is Part Of A Legislative Scheme To Provide Liberal Benefits Earned Through Service To The Country In The Armed Forces Of The United States

The statute at issue must not be viewed in isolation. It is an integral part of a scheme established by Congress to recognize, through a comprehensive system of liberal benefits, the substantial contributions made by those who have served the nation honorably in its armed forces. This statutory scheme contains a full range of benefits which, among others, includes: disability compensation for service members[5]; dependency and indemnity compensation for the surviving spouse, children and parents of veterans[6]; pensions for veterans and surviving spouses[7]; free or reduced fee hospital, nursing home, domiciliary and other medical care[8]; life insurance[9]; guaranteed reemployment upon conclusion of military service[10]; education, job training, counseling and placement benefits for both veterans

[5] 38 U.S.C. §§ 1101-1163 (Supp. IV 1992).

[6] 38 U.S.C. §§ 1301-1323 (Supp. IV 1992).

[7] 38 U.S.C. §§ 1501-1562 (Supp. IV 1992).

[8] 38 U.S.C. §§ 1701-1754 (Supp. IV 1992).

[9] 38 U.S.C. §§ 1901-1988 (Supp. IV 1992).

[10] 38 U.S.C. §§ 4301-4307 (Supp. IV 1992).

and their surviving spouses and children[11]; loans for housing and small business[12]; and burial benefits[13].

Indeed this Court has recognized that these wide-ranging benefits comprise one scheme of legislation by which Congress has intended to benefit veterans. *United States v. Oregon*, 366 U.S. 643, 647 (1961) (interpreting a law which provided that the property of veterans who die in a state veterans home, intestate and without heirs, escheats to the United States rather than the State. "This natural construction we give to [this section of the law] makes it fit well into the pattern of legislation dealing with this subject. . . . The solicitude of Congress for veterans is of long standing.")

B. The Provisions Of Such Remedial Legislation Should Generally Be Liberally Interpreted In Favor Of The Beneficiary

When interpreting legislation that is remedial in nature, this Court has always given great weight to effectuating the beneficent purposes of the legislation even when faced with countervailing policies of the common law. *See, e.g. Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, 449 U.S. 268, 281, 283 (1980) (The Longshoremen's and Harbor Workers' Compensation Act[14] , like other workmen's compensation legislation, is a remedial statute intended to provide employees with recovery without fault, thus precluding the various common-law defenses frequently resulting in denial of recovery. The [clear] language of such a statute cannot be ignored or rewritten by the Court, even if it leads to incongruous or seemingly unjust results.);

[11] 38 U.S.C. §§ 3001-3036, 4100-4110 (Supp. IV 1992).

[12] 38 U.S.C. §§ 3701-3751 (Supp. IV 1992).

[13] 38 U.S.C. §§ 2301-2308 (Supp. IV 1992).

[14] 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950 (1976 ed. and Supp. III).

Cox v. Roth, 348 U.S. 207, 209 (1955) ("The extreme harshness of the old common-law rule abating actions on the death of the tortfeasor flies in the face of the expressed congressional purpose to provide for 'the welfare of seamen.' The Jones Act[15] 'As welfare legislation . . . is entitled to a liberal construction to accomplish its beneficent purposes.'" Citing *Cosmopolitan Co. v. McAllister*, 337 U.S. 783, 790 (1949)); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952) (concerning the rights of seamen under Shipping Commissioners Act of 1872,[16] "No rule of construction precludes giving a natural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character. It should be interpreted to effect its purpose."); *Cosmopolitan Co. v. McAllister*, 337 U.S. at 790 (interpreting the Jones Act and the War Shipping Administration (Clarification) Act[17] "In considering similar [welfare] legislation in other fields, we have concluded that Congress intended that the purposes of such enactments should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality a part of the processes and dependent upon the businesses to which they rendered service.")

C. Legislation Designed To Benefit Veterans Is Legislation Due A Liberal Interpretation, Favoring Those Whom It Was Designed To Benefit

This Court has a consistent history of liberally interpreting legislation affecting veterans so as to provide the greatest benefit possible under the law to veterans. *See, e.g. Coffy v. Reynolds Steel Corp.*, 447 U.S. 191, 196 (1980) (regarding the Vietnam Era Veterans' Readjustment Act of 1974, § 38 U.S.C. 2021 *et seq.* "The statute is to be liberally construed for the benefit of

[15] Cited as 41 Stat. 1007, 46 U.S.C. § 688.

[16] Cited as 30 Stat. 756, 38 Stat. 1164, 46 U.S.C. § 596.

[17] Cited as 41 Stat. 1007, 46 U.S.C. § 608 and 57 Stat. 45, 50 U.S.C. App. 1291.

the returning veteran."); *United States v. Oregon*, 366 U.S. at 647 (Interpreting portions of Title 38) providing the property of veterans who die intestate and without heirs in a state veterans home becomes property of the United States to be used for the General Post fund to benefit other veterans and not of the state under its laws of intestate succession.); *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962) ("Since legislation of this type [exempting veterans benefits from attachment] should be liberally construed [citation omitted] to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof [citation omitted] we feel that deposits such as are involved here should remain inviolate."); *F.H.A. v. The Darlington*, 358 U.S. 84, 86 (1958) ("We do not think the Act[18] gave mortgagors the right to rent to transients. There is no express provision one way or the other; but the limitation seems fairly implied. We deal with legislation passed to aid veterans and their families, not with a law to promote the hotel or motel business".) *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (regarding the Selective Training and Service Act of 1940[19], "This legislation is to be liberally construed for the benefit of those who left private life to serve their country."); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("Soldiers & Sailor's Civil Relief Act[20] is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up burdens of the nation.").

For these overriding reasons, the Court should begin its analysis, not with the narrow focus on Section 1151, but with the broader view that this provision is but one piece of a broad scheme of legislation authored by the elected representatives of

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[18] The National Housing Act (cited as 56 Stat. 303, 12 U.S.C. § 1743 as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214).

[19] Cited as 54 Stat. 885, 50 U.S.C. App. § 301.

[20] Cited as 54 Stat. 1178, 1181, 50 U.S.C. App. § 521.

a grateful nation, designed to provide liberal and well deserved benefits to those who have borne the burden of military service. When viewed in this context, the Court should, consistent with its precedent interpreting other legislation benefiting veterans in particular and legislation effectuating similar remedial purposes in general, give Section 1151 a reading which most benefits its intended beneficiaries, those veterans who suffer additional disability while undergoing medical treatment provided by the VA.

II. CONDITIONING THE AWARD OF VETERANS DISABILITY BENEFITS ON THE CONCEPT OF FAULT IS INCONSISTENT WITH THE GENERAL STATUTORY SCHEME OF VETERANS BENEFITS

A. Entitlement To Veterans Disability Benefits Is Not Based Upon Concepts Of Fault; Rather, It Is Predicated Upon An Individual's Status At The Time A Disability Is Incurred

Apart from the general rule that Section 1151 should be interpreted liberally to benefit the veteran, the Court must interpret this statute in a manner consistent with the statutory scheme of determining entitlement to veterans' disability benefits.

The Solicitor would have the Court adopt the common law of negligence as its construct for analysis of this case. This would be unwise. The statutory scheme under which veterans qualify for disability benefits bears no relationship to the traditional concept of the common law of negligence which is based upon the determination of whether or not the alleged tortfeasor can be found at fault because he or she violated a legal standard of care. See Restatement (Second) of Torts §§ 298, 299A (1964). Section 1151 is not a statute designed to apportion fault for medical miscues. It, rather, defines one of the many benefits for which veterans of the armed forces may qualify.

Consequently, more properly, the Court should analyze this case under the backdrop of the basic entitlement to scheme of disability benefits administered by the VA. Such entitlement has no fault element. Entitlement is, rather, temporal in nature, predicated solely upon a finding that a veteran has a disability and that disability resulted from an injury or disease that either first occurred during a qualifying period of military service or was aggravated during such service. 38 U.S.C. §§ 1110, 1131 (Supp. IV 1992). The law does not require a causal link between the injury or disease and the veteran's military duties, but only that the injury or disease occurred during a period of qualifying service. *Walters v. Nat. Ass'n. of Radiation Survivors*, 473 U.S. 305, 307 (1985). See *also Browder v. Derwinski*, 1 Vet. App. 204, 207 (1991); *Laposky v. Brown*, 4 Vet. App. 331, 334 (1993).

It is upon this basic foundation that the law of VA disability benefit entitlement is built. In effect, Congress has recognized what so many Americans believe and this Court has approved, that veterans have been obligated to drop their own affairs and take up the burden of the nation, subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life. As a result, our country has a long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This Court has found this policy to be legitimate. See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 551 (1983), citing other cases.

Consequently, the decisions below, which held that the VA's infusion of the element of fault into its adjudication of claims filed under Section 1151 violates the law, are entirely consistent with the statutory scheme enacted by Congress to compensate veterans for their many past contributions.

B. The VA Itself Has Represented To Congress That, Prior To 1988, It Did Not Utilize Procedures Consistent With The Traditional Legal Principles Of Medical Malpractice To Adjudicate Claims For Veterans Benefits

In describing the VA adjudication system before the Senate Committee on Veterans' Affairs in 1988, the VA General Counsel noted the liberal due process protections provided to the veteran in the adjudication of benefit claims. The General Counsel cited the availability of multiple administrative reviews, agency assistance in obtaining evidence, advice given by the agency regarding the laws and regulations pertinent to the veteran's claim, and oral hearings on demand as examples of the liberal treatment given to the veteran seeking benefits. *Judicial Review Legislation: Hearing Before the Senate Comm. On Veterans' Affairs On S. 11, the Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act*, S. Hrg. No. 938, 100th Congr., 2d Sess. 492 (1988) (statement of Donald L. Ivers, General Counsel, Veterans Administration).

Moreover, the General Counsel specifically denied the VA's use of such traditional hallmarks of malpractice adjudication as the consideration of evidence outside the VA file, consideration of consultative opinions or scientific treatises or medical journal articles bearing to the issue, and assessments of credibility of persons giving evidence to the VA. *Id.* at 494.

In summary, the VA General Counsel stated, "We are unaware of any administrative process operated by any other Federal agency that is more pro-claimant, simpler to use, or more equitable" and "the present system is informal and assistive. It works for veterans, it works with veterans, and is monitored by veterans. So uniquely beneficent a system should not be jeopardized for the philosophical end of guaranteeing a few unsuccessful claimants the opportunity of having their

claims again considered — and probably denied — in a court of law." Id. at 493 and 502.

As the VA General Counsel himself testified, the statutory scheme in which Section 1151 arises is one designed to provide every assistance to a veteran seeking to establish his or her entitlement to a benefit earned by virtue of service to their country, and is not one designed to place upon the veteran the difficult burden of establishing the presence of negligence or other fault.

III. THE INTERPRETATION OF SECTION 1151 BY THE VA IS DUE NO DEFERENCE

A. Prior To 1988, This Court Recognized That The VA Was Due Deference In Interpreting The Laws Relating To Veterans Benefits

Before 1988, Congress (and the Courts) were content to permit the VA to provide virtually unreviewable, and thus supremely authoritative, interpretations of the laws governing benefits for veterans. Prior to that year, 38 U.S.C. § 211(a) prohibited judicial review of matters relating to veterans benefits.[21] The VA asserted and the Court recognized two primary reasons for such preclusion:

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[21] Prior to November 18, 1988, 38 U.S.C. § 211(a) read in pertinent part:

> § 211. Decisions by Administrator; opinions of Attorney General
>
> (a) (1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.
>
> (2) The second sentence of paragraph (1) of this subsection does not apply to —

Section 211 was repealed by P.L. 102-83, § 2(a), 105 Stat. 378 but has been recast as 38 U.S.C. § 511 (Supp. IV 1992).

> Court acknowledges VA's assertion of two primary purposes of the no-review clause in 38 U.S.C. § 211(a) to be: "(1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of the Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.

Johnson v. Robison, 415 U.S. 361, 370 (1974).

B. After 1988 And The Passage Of The Veterans' Judicial Review Act, The VA's Interpretation Of The Laws Relating To Veterans' Benefits Should No Longer Be Given Deference

On November 18, 1988, the Veterans' Judicial Review Act[22] (hereinafter "VJRA") became law, eliminating the no-review provisions of 38 U.S.C. § 211(a) regarding the VA's decisions on veterans benefits.[23] The new law also specifically made the VA subject to the rulemaking provisions of the Administrative Procedure Act. This action by Congress ended some 170 years of total independence by the VA (and its predecessor agencies) in interpreting the laws providing benefits to veterans and the procedures and interpretations used to adjudicate claims for those benefits. H.R. Rep. No. 963, 100th Cong., 2d Sess. (1988), *reprinted in* U.S. Code Cong. & Admin. News 5782. Such action did not come without substantial investigation and debate.[24]

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[22] Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1989).

[23] The VJRA added to the exclusions contained in subsection (2) decisions regarding the award of disability and other benefits.

[24] *See generally Judicial Review Legislation: Hearing on S. 11, The Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act Before the Comm. on Veterans' Affairs of the United States Senate*, 100th Cong., 2d Sess.